MOTION FILED
FEB 25 1987

(15)

No. 86-44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS INC. and
MARY ANN MCNULTY,

Petitioners,

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO EXTEND THE TIME WITHIN WHICH TO FILE AND MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE SUPPORTING THE INTEREST OF RESPONDENTS AND BRIEF AMICI CURIAE

CARVEL GORDON DILLARD,
as Amici Curiae
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS INC. AND

MARY ANN MCNULTY,

PETITIONERS

v.

EUGENE MCMAHON, et al

RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION TO EXTEND THE TIME WITHIN WHICH TO FILE AMICI CURIAE BRIEF AND MOTION TO FILE AMICI CURIAE BRIEF.

CARVEL GORDON DILLARD, hearby respectfully moves, pursuant to Rule 42 and Rule 29 and Rule 36 of this Court for an extension of time within which to file Amici Curiae Brief. The consent of respondents has been obtained.

Consent of petitioners has been requested but was not granted.

CARVEL GORDON DILLARD ("Dillard") is a small investor and speculator and is a consumer of brokerage services. Dillard is currently plaintiff in C. G. Dillard v. Merrill Lynch, Pierce, Fenner and Smith Inc., in the United States District Court for the Southern District of Texas, Houston Division, Civil Action No. H 854135. In that case, on September 11th, 1985, Dillard filed his Plaintiff's Motion to Declare Compulsory Arbitration Provisions Of The Brokers Adhesion Contracts To Be Invalid, and Unenforceable and To Enjoin Enforcement Of Same. The District Court has made no ruling on that motion, therefore Dillard has substantial interest in the extent to which agreements between securities firms and their customers to arbitrate claims may be enforced.

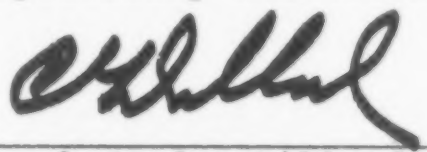
Dillard became aware of the case

currently before this Supreme Court only recently by way of a magazine article and therefore a more prompt response was not possible. Dillard firmly believes that his brief will show the Court that it does not need to make new law or in any way modify existing law in order to acheive a fair, equitable, and elegant solution to the issues currently before the Court. The brief explains why Common Law Of Equity and rights guaranteed under the United States Constitution and Federal Anti Trust Law should govern the Courts action. These issues are of the grestest importance to the people of the United States. Yet the pleadings currently before the Court do not address these issues; although they are the root cause of respondents disclaimer of the validity of the adhesion arbritration clause. Dillard respectfully moves that this Court shall please allow him an extension of time within which to file Amici Curiae Brief

and he respectfully moves that this Court now accept for filing the Amici Curiae Brief. He asks these things in the interst of greater clarity of the issues before the Court and in the interest of justice.

Dated February 19, 1987.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hearby certify that three true and correct copies of: (1) Motion To Extend the Time Within Which To File (2) Motion For Leave To File Brief Amici Curiae, and (3) Brief Amici Curiae, have been sent by express U.S. certified mail return receipt requested to:

Counsel For Respondents
Theodore G. Eppenstein
Eppenstein & Eppenstein
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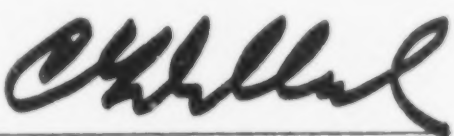
(212) 752-1000

And to:

Counsel For Petitioners
Theodore A. Krebsbach
Office of General Counsel
Shearson Leahman Brothers Inc.
2 World Trade Center
New York, New York 10048
(212) 321-6837

I do so certify on this 25th day of February 1987.



Carvel Gordon Dillard

No. 86-44

IN THE

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OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS INC. AND

MARY ANN MCNULTY,

PETITIONERS

v.

EUGENE MCMAHON, et al

RESPONDENTS

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

Brief Of Amici Curiae In
Support of Respondents

PRELIMINARY STATEMENT

Carvel Gordon Dillard, ("Dillard") submits this Brief as Amici Curiae in support of the respondents and urges this Court to declare that purchasers of securities may not be compelled to relinquish substantive federal statutory rights to judicial review and trial by jury of claims aserted under Section 10 (B) of the Securities Exchange Act

of 1934, 15 U.S.C. Section 78 J (B) in contravention of the Fourteenth Amendment to the United States Constitution and in direct violation of the Sherman Act (15 U.S.C. Sections 1-7).

INTEREST OF AMICI CURIAE

Dillard is a consumer of services provided by the securities industry. In order to effectively trade in securities he was compelled to execute essentially the same adhesion margin agreement contract as was respondents, likewise Dillard subsequently also made claim under Section 10 B-5 of the Securities Exchange Act of 1934; likewise the securities firm which had defrauded Dillard made Motion to Compell Arbitration and Motion That All Disputes Must Be Settled In Arbitration as per the arbitration clause of their adhesion contracts. These matters are still before the District Court for the Southern

District of Texas.

Dillards interest is exactly the same as respondents as regards the 10-B-5 violation and the method the securities firm has attempted to use in order to exempt itself from the consequences of its own illegal acts. The District Court in Houston has over the past seventeen months repeatedly delayed making any ruling --- without explanation for delay. Perhaps it will follow the precident of the Supreme Court in this case. Therefore Dillard has substantial interest in a correct and equitable ruling by this Supreme Court.

SUMMARY OF ARGUMENT

Respondents have stated in their brief that they refuse to concede that the customer arbitration agreements are valid or enforceable. The amici curiae will show that the adhesion arbitration agreements are invalid and unenforceable; due to violations

of law and equity which are grounds for the revocation of any contract.

The securities industry is acting in concert in violation of the Sherman Act; their securities brokerage monopoly acts to restrain the trade of any who refuse to arbitrate. No one can trade in securities on margin without renouncing their freedom of contract and renouncing the protection of law for their property --- rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The contracts in question are adhesion contracts: it is a standard form offered to respondents and to the amici curiae, Dillard, on a "Take it or Leave it" basis without affording realistic opportunity to bargain and under such conditions that respondents could not obtain the desired services except by acquiescing to the form contract. Respondents had no choice as to its terms. Assent was not voluntary, it was coerced by

the advantage of petitioners which was unlawfully exercised. Unlawful advantage of petitioners consisted of threat to prohibit trade of respondents in securities. The threat constituted duress which induced respondents to sign the contracts contrary to respondent's will and to respondent's detriment. Petitioner's threat of restraint of respondent's trade overcame respondent's will and liberty of discretion to such an extent as to influence respondents to act in a way that respondent's judgement and discretion would condemn and prompt them not to do, if free from such influence.

Petitioner's exploitation of unfair advantage in exempting itself from much of the consequences of its own negligence and illegal acts amounts to unfair protection of the interests of petitioner's in so large a manner as to interfere with the public interest. If petitioners had been afforded

the option to choose protection under the law or arbitration then the arbitration provision would be enforceable. But compelling a consumer to renounce his protection under the law upon pain of denial of services is contrary to public policy. If the desired services could be obtained from another brokerage house the petitioners might argue that respondents did not have to trade with it and therefore the duress was not so extreme as to force compliance. But brokerage house services currently are, and at the time of contract were, unavailable to any consumer unless that consumer signs a virtually identical compulsory arbitration provision.

There is a de facto conspiracy of brokerage houses to deprive buyers and sellers of securities of rights to due process and protection of law in securities transactions by restraint of trade and commerce in purchase and sale of securities.

Every major brokerage house has conformed to a uniform pattern of conduct in compelling the execution of a contract containing a compulsory arbitration provision. The amici curiae was unable to find any brokerage house large or small that does not impose upon its customers a contract stipulating compulsory arbitration as a precondition to business. Therefore choice even at another brokerage house was impossible.

Agreement, combination or conspiracy may be inferred from course of dealings warranting conclusion that conspirators had common design, meeting of minds or acted in concert and uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce is sufficient to establish unlawful conspiracy under the Sherman Act. The amici curiae, Dillard, submits to the Court that petitioners

actions are a violation of the Sherman Act in the manner just described. Please see: William Goldman Theaters, Inc. v. Loew's, Inc. (1945, Ca. 3 Pa.) 150 F2d 738.

ARGUMENT

The United States brought suit in the District court of the United States for the Southern District of New York, attacking the contract in question or a similar one on the ground that it was in violation of the Sherman Anti-Trust Act. In an able opinion, Judge Thacher of that court held the arbitration clause of the contract to be unlawful as being in violation of the Sherman Anti-Trust Act, United States v. Paramount Famous Lasky Corporation, 34 F. (2d) 984, and entered a decree enjoining the Paramount Famous Lasky Corporation, from acting under the arbitration clause in the contract. The opinion and decree of the District Court was affirmed by the Supreme

Court of the United States (Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed.--).

District Judge Thacher adjudged that:

"Trade or commercial groups or traders generally may voluntarily impose on themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, and may agree that all controversies should be settled by arbitration so long as such agreements are not sought to be imposed on others, regardless of their wishes, by coercive combinations having power to enforce their will.

The conspiracy charged in this case is predicated upon acts of the defendants in adopting and agreeing to use, and in using exclusively, certain uniform contracts for the lease of motion picture films to theater owners throughout the United States, containing provisions for the determination

by arbitration of all claims and controversies arising under said contracts.

...It had been the consistent policy of the distributors to refuse to deal with exhibitors who failed to arbitrate....The coercive effect of this situation has undoubtedly been that, unless exhibitors submitted to arbitration...they have been unable to enter into new contracts.

...One can hardly imagine a more direct restraint upon trade than an agreement betweeen competitors in an open market not to trade except upon terms which they have fixed in advance.

...In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade under natural and normal conditions. It is therefore not

enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to enter into normal commercial agreements, and to have recourse to the courts for their rights has been unduly restrained by the coercive and collective action of the defendants. That competition between the ditributors has been promoted by the adoption of the standard exhibition contract, and that in many ways general trade conditions have been vastly improved, I have no doubt and so find. But the record is equally clear that all this good has been accomplished through the exercise of irresistible economic force consolidated by combination in the hands of the distributors, who collectively control the available supply of films and by virtue of this control have imposed their will upon the industry. By agreement of

these distributors exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the complusory system of arbitration, sanctioned and enforced by the collective action of the distributors, have been constrained to perform the contractual obligations thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the contracts. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an exhibitor, who

was neither represented nor consulted with reference to the agreement to adopt the standard form of contract, is undue and unreasonable, both at common law and uder the Sherman Act, I cannot doubt. Gains resulting from such restraints to the industry as a whole do not in the eyes of the statute justify the vicarious sacrifice of the individual, even for the sake of bigger and better business. A state Legislature could not lawfully impose compulsory arbitration upon the motion picture industry. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 ALR 1280. Much less sould it be within the power of a combination of practically all the distributors to do so by coercion exercised through control of the available supply of films.

...The restraint, if not shown to have been voluntary on both sides, is oppressive, and therefore undue and unreasonable.

...Nothing that has been said should be taken in derogation of the right of trade or commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought to be imposed upon others, regardless of their wishes, by coercive combinations having the power to say 'Take what is offered or get nothing,' that they become illegal."

Dillard's case in the District Court and respondents case in this Supreme Court are indistinguishable from the Paramount Case in all essential elements concerning the

arbitration clause.

Petitioner's alleged right to force arbitration on all its customers whether they like it or not is in conflict with the Fourteenth Amendment to the United States Constitution, and deprives respondents of their property and liberty of contract without due process of law. For this and the other reasons aforementioned amici curiae respectfully submits that petitioners should be enjoined from acting under a compulsory arbitration clause contained in any adhesion contract.

Duress in inducement of arbitration agreement is proper ground for revocation under 9 USCS Sec. 2. See Hellenic Lines LTD v. Louis Dreyfus Corp. (1967, CA 2 NY 372 F2d 753).

The coercion and duress consisted of illegal restraint of trade in violation of the Sherman Act. Amici curiae submits to this Supreme Court that a Sherman Act

violation in the signing of the arbitration agreement voids that agreement. It is fact that the petitioners participate in a coercive combination with its brokerage industry competitors in obvious violation of Federal Anti-Trust Law.

By design no consumer shall anywhere trade securities unless he first renounce protection of law and accept arbitration. The consumer is by duress deprived of the right of voluntary contract making the compulsory arbitration provision no contract at all. It is more simply a unilateral declaration by the brokerage houses in concert; not a mutually agreed contract and as such it is null and void and has no force of law. The amici curiae's allegation of Federal Law violation is directed to the arbitration clause itself -- not the contract generally. Please see: Prima Paint Corp. v. Flood and Conklin Mfg. Co. 388 U.S. 395, 406 (1967): "Accordingly, if the claim is an

illegal act in the inducement of the arbitration clause itself -- an issue which goes to the 'making' of the agreement to arbitrate -- the Federal Court may proceed to adjudicate. This position is consistent both with the decision in Moseley v. Electronic Facilities, 374 U.S. 167, 171, 172 (1963) and with the statutory scheme. As the 'saving clause' in Sec. 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicail challenge ... would be to elevate it over other forms of contract -- a situation inconsistent with the 'saving clause'") see 388 U.S. 403-404).

Federal policy suggesting that arbitration be encouraged did not give license for coercive combinations which operate in restraint of trade; nor does such a policy allow violation of Federal Anti-Trust Law in order to promote arbitration.

It has been established that claims under the Sherman Anti-Trust ACt (15 USCS Sec. 1 et.sq.) are inappropriate for arbitration. Please see American Safety Equipment Corp. v. J. P. Maguire & Co. (1968, CA2 NY) 391 F2d 821, 3 ALR FED 901.

In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), this Court pointed out by way of footnote that the decision expressed no view on the validity of arbitration provisions contained in adhesion contracts and that the issue was not addressed because it was not first raised in the lower courts and you thought it improper to address it in the first instance. However, the Supreme Court has previously ruled that an arbitration provision contained in a contract of adhesion is null and void if it is imposed by a participant in powerful coercive combination which acts to restrain trade of those who fail to agree to arbitrate. Until and unless this Supreme Court reverses itself

on that decision it is the law. This case is in every particular exactly the same as the Paramount case (34 F2d 984 and 282 U.S. 30) as regards the agreement to arbitrate and therefore it must be treated under the law in the same manner. In order to validate its adhesion arbitration clause, petitioners must show that this case and the Paramount case are different. But it can not, for they are the same as regards the adhesion arbitration clause. This Court's previous decision clearly outlawed adhesion arbitration clauses which are forced upon a party by monopoly.

Today a film exhibitor can contract for film rental without executing an arbitration agreement. An investor should also be able to deal with a brokerage house under the protection of law. The standard that this Court should impose is that arbitration provisions of brokerage contracts may not be enforced against the party which had no choice because of restraint of trade.

Rejection or acceptance of compulsory arbitration by free choice could be shown upon the contract by the initialing of appropriate box. Similarly, contracts for loans often used to include adhesion provision that insurance, often at high cost, be purchased by the borrower. Lending institutions must now allow the consumer to accept or reject this coverage, which is accomplished by the consumer initialing his choice in an appropriate box upon the contract. The Court should require that if petitioner wants mandatory arbitration it must draft its contracts in such a way that the arbitration provision is not adhesion but rather is shown to be the free choice of the consumer. Once agreement to arbitrate is made, without duress, then and only then is the contract binding with the force of law and the Courts to compel arbitration as per the Byrd decision.

This Court had to assume that no duress

or compulsion by monopoly was involved in the making of the agreement to arbitrate in the Byrd case because that is the way the case came to you. However, unlike the Byrd case, in this case there is allegation by disclaimer that the agreements to arbitrate are not valid or enforceable and the amici curiae has shown violations of Federal Law in the making of the agreement to arbitrate which supports respondent's allegations.

If the securities brokerage industry is allowed to place itself above the law by legislating by contract could not then any monopoly exempt itself from the rule of law by embracing an arbitration panel? Such a policy would be aginst the public interest.

There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest. Therefore, petitioner's adhesion arbitration clause must be declared void as a result of

its imposition by monopoly in violation of the Sherman Act as per the Supreme Court's Paramount decision. Petitioners should send a contract addenda to its current customers allowing them to choose either arbitration or the law in the event of future controversy. Legally, the customer must be able to choose either, at the customer's sole option, because the voiding of the contract provision for compulsory arbitration due to compulsion by monopoly is not available to petitioners, although by the law of the Paramount case it currently is to petitioner's customers which include repondents in this case.

The Comodity Futures Trading Commission in 17 C.F.R. Section 180.3 voided arbitration agreements which, inter alia, are not voluntary. The record of Ames v. Merrill Lynch, Pierce, Fenner & Smith Inc. 567 F2d 1174 (1977) shows why: Because the brokerage houses admitted that if a trader did not sign

a compulsory arbitration agreement he was not able to trade effectively and was thus squeezed out of the commodities market. Today we have the exact same situation regarding trading securities in margin accounts: It is impossible to trade effectively in securities without a margin account and an investor can not get one anywhere unless he signs a compulsory arbitration agreement.

The Securities and Exchange Commission which should protect the investor from this abuse shows little concern for the rights of individual investors. This is understandable because the individuals who make up the comission are frequetnly employed by the large brokerage houses prior to and often after their public service. This is not to say that the members of the commission are not good and honorable men - because they are - but because they are often participants in the industry that they are supposed to

regulate, they most often identify philosophically with the providers of securities services rather than consumers. Therefore the commission is ineffective in protecting the rights of consumers and often the commission acts to preserve the overwhelming advantage of the industry to the detriment of consumers.

The Court should recognize the gross violation of existing law exhibited by the securities industry when they legislate by adhesion contract. Prohibit enforcement of compulsory arbitration by adhesion contract and there is no complaint from any investor and no violation of the Fourteenth Amendment and no violation of the Sherman Act and no conflict with the Federal Arbitration Act.

Things will become fair and equitable in securities trading only if a man choose to arbitrate and signs a contract to that effect because he perceives it to be to his own advantage, which free choice and perceived

advantage are the essence of a contract and an unfair adhesion demand upon pain of loss of necessary services is no contract and is contrary to the principles upon which this great nation was founded. And should the Court allow it in this instance what then prevents other coercive combinations from setting up their own arbitration panels and by irresistable economic force and adhesion contract then exempting themselves from the rule of law?

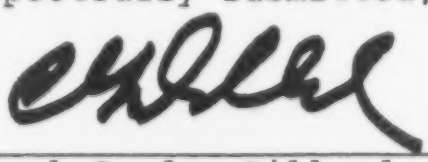
CONCLUSION

Compulsory arbitration by adhesion contract should be enjoined as being in violation of the Fourteenth Amendment to the Consitution of The United States of America.

In the alternative, or additionally, the Court should declare the arbitration clauses contained in the petitioner's adhesion contracts to be void and unenforceable because of violation of Common Laws of Equity and because of violation of the Sherman Anti-Trust Act.

Dated February 23, 1987.

Respectfully Submitted,



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